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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1977
No. A-515

JOHN D. SCHROEDER,

Appellant,

vs.

THE MUNICIPAL COURT OF THE LOS CERRITOS JUDICIAL DISTRICT,

Appellee,

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

On Appeal From the Court of Appeal, Second Appellate District, of the State of California.

Motion to Dismiss Appeal From State Court (Pursuant to Supreme Court Rule 16(1)(b)).

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Appellee, the Municipal Court of the Los Cerritos Judicial District, and Real Party in Interest, the People of the State of California and the City of Cerritos, pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States, move the Court to dismiss the appeal herein for the reasons and on the grounds hereinafter set forth:

Statement of Case.

This case involves an appeal from a decision of the California Court of Appeal, Second Appellate District, Division Two, filed October 3, 1977, and modified October 13, 1977, which affirmed the judgment of the Los Angeles County Superior Court, Appellate Division, entered on June 22, 1976, denying appellant a peremptory writ of prohibition by which appellant sought to prevent his prosecution under a Municipal Code of the City of Cerritos, California, which limits the height to which radio and television antennas may be erected in residential zones. Section 22.22.700 of the City of Cerritos Development Code provides in pertinent part as follows:

> *22.22.700 Site development standards.* . . . the following standards shall apply to residential development in the RS zones:
>
> * * *
>
> (10) BUILDING HEIGHT: The building height shall be no greater than thirty-five feet;
>
> * * *
>
> (21) RADIO AND TELEVISION ANTENNAS: Radio or television transmission or receiving facilities shall conform to the following provisions:
>
> "(a) The facilities shall not exceed forty feet in height from ground level or fifteen feet above the roof height, whichever is least unless permitted by the planning commission,
>
> (b) The facilities shall be attached to the main building and any guy wires shall be anchored only to the main building (Ord. 428 §3, 1972; Ord. 344 §5 (part), 1972). (C.T. 156)."

ARGUMENT.

1. The Judgment Herein Appealed From Rests on Adequate Nonfederal Bases.

It is respectfully submitted that the judgment herein appealed from by the appellant rests on adequate nonfederal bases. As this Honorable Court stated in the case of *Henry v. Mississippi*, 379 U.S. 443, 446-447, 13 L.Ed.2d 408, 412, 85 S.Ct. 564 (1965):

> "It is, of course, a familiar principle that this *Court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions.* The principle applies not only in cases involving state substantive grounds, *Murdock v. City of Memphis*, 20 Wall. 590, 22 L.Ed. 429, but also in cases involving procedural state grounds. . . . [Citations omitted]. But it is important to distinguish between state substantive grounds and state procedural grounds. Where the ground involved is substantive, the determination of the federal question cannot affect the disposition if the state court decision on the state law question is allowed to stand. Under the view taken in *Murdock* of the statutes conferring appellate jurisdiction on this court, we *have no power to revise judgments on questions of state law. Thus, the adequate nonfederal ground doctrine is necessary to avoid advisory opinions.*" (Emphasis added).

The California Court of Appeal, Second Appellate District, Division Two, 73 Cal.App.3d 841 (1977) rejected appellant's contention that the federal regulation of radio transmission under the 1934 Communica-

tions Act (47 U.S.C. §151 *et seq.;* 47 C.F.R. §97 *et seq.*) had preempted the field. The Court, at page 845, cites several cases and a California Attorney General Opinion which concludes that pursuant to its police powers, a chartered city may enact reasonable regulations as to height, location and method of installation of amateur radio antennas. (Opn. No. 71-79, 54 Ops. Cal. Attny. Gen. 102 (1971).). The Court indicated that the request for the Attorney General's opinion was precipitated by an accident where by one man was killed and four others were injured when they lost control of a 65-foot antenna they were attempting to install. The Court stated as follows at page 845:

> "The justification for permitting local regulation of antenna height is that antennas may be a safety hazard, may decrease property values, and may constitute 'eyesores', . . . [reference omitted]."

The Supreme Court in the case of *California v. Zook,* 336 U.S. 725, 728, 93 L.Ed. 1005, 1008, 69 S.Ct. 841 (1949) stated that if the local activity is of predominantly local interest then state action may be permissible. The Court went on to observe that "existing authority regarding regulation of antenna height has found sufficient local interest to sustain local regulation." (*Id.* at 846). It concluded that since "valid considerations to support local regulation of antenna height exist, the ordinance is not preempted by federal regulation. . . ." The considerations referred to by the Court were delineated at page 848 as follows:

> "Similarly here, possible safety considerations, economic factors, and aesthetic factors all support local regulation of the height of antennas and the manner of their installation."

And, at page 849 it went on to state:

> "Courts have recognized that economic and aesthetic considerations may be closely interwoven, and they have granted broad discretion to local activities to regulate residential land use in order to stabilize economic and social aspects of a neighborhood and to promote aesthetic considerations, family environments, and basic residential character."

The Court's decision clearly rested on adequate state grounds.

In closing, it must be emphasized that this Court in the cases of *Village of Belle Terre v. Boraas,* 416 U.S. 1, 39 L.Ed. 2d 797, 94 S.Ct. 1536 (1974) and *Moore v. East Cleveland,* ..... U.S. ....., 52 L.Ed.2d 531, 97 S.Ct. ..... (1977) upheld the right of a municipality to limit occupancy to family units of related individuals. Certainly, a city can restrict the size of television and radio antennas to a height which it concludes is in the best interests of the general public because it makes the community safer or more attractive.

2. The Judgment Herein Appealed From Fails to Raise Any Substantial Federal Question.

The decision of the California Court of Appeal herein accurately describes the vast preemptive power of the federal government. In upholding the subject local regulation that Court cited and relied upon existing federal court decisions supporting its conclusion. There is no decisional law—state or federal—which holds that local land use regulation of antenna height has

been preempted by the Federal government in its adoption or implementation of the Communications Act of 1934, 47 U.S.C. §515 *et seq.*

Conclusion.

Based on the foregoing reasons, appellee and Real Party in Interest respectfully submit that the judgment appealed from by the appellant clearly rests on adequate nonfederal bases, fails to present any substantial federal question and that this appeal should be dismissed.

Dated: March 31, 1978.

Respectfully submitted,

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